Regime of Liability in Private International Air Law - with Focus on the Warsaw System and the Montreal Convention of 28 May 1999

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The purpose of this paper is to examine some of the rules of the Warsaw Convention for the Unification of Certain Rules for International Carriage by Air of 1929 and compare these with the Montreal convention of 1999 in attempting to answer whether or not Denmark should ratify the Montreal Convention.

The paper is divided into 7 chapters. Chapter 2 and 3 give an overview of the basic provisions of the Warsaw Convention where unity of law was achieved, the merits and shortcomings of this convention and the advantages of the new Montreal Convention. These chapters do not merely focus on liability rules, but also on other areas in the conventions where unity of law was achieved. Chapter 4 takes a closer look at exoneration of liability and the most disputed provision of the Warsaw System, namely the subject of limitation of liability, which is the most important merit of the Montreal Convention. The chapter examines the problems caused by such a limit in today's society and ways of getting around it. The last part of the paper, chapters 5 and 6, examines the terms "accident" and "bodily injury" in Art. 17, as well as the time period of the carrier's liability and the exclusiveness of the Warsaw Convention. Finally, chapter 7 sums up the merits and shortcomings of the Warsaw System as well as the advantages and missed opportunities of the Montreal Convention.

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Chapter 1. Introduction

The majority of international air transport today is governed by the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air adopted on 12 December 1929.[1] The convention is currently in force in 146 states and represents the most widely accepted unification of private law.[2] The convention established and elaborated the air carrier's liability for damage caused to passengers, baggage and cargo, and damage caused by delay.[3] Drafted at a time when carriage by air was a dangerous adventure and when most airlines were government owned, the convention was a major contribution to the unification of law but has now been outdated for many years. Attempts have been made over the years to update the convention through protocols and private initiatives all resulting in a disunification of law.

In May 1999 an international conference was held in Montreal hosted by the International Civil Aviation Organization (ICAO) intending to update and replace the Warsaw System. It was a major international conference with 121 Contracting States attending and a total of 544 registered participants.[4] On May 28, 1999, the new Montreal Convention was created and signed by 52 countries, including Denmark. While the conference was expected to be a landmark in the history of international law-making and of unification of private law, its success remains to be seen, namely by the speed of ratification of the new Convention.[5] Denmark has not yet commenced the process of ratification of this Convention.

The purpose of this paper is to examine the language and scope of, and the jurisprudence under the articles concerning passenger liability in the Warsaw Convention and compare these with the Montreal convention in attempting to answer whether or not Denmark should ratify the new Montreal Convention.

The paper shall scrutinize the merits and shortcomings of the old Warsaw System, touch upon the advantages of the Montreal Convention, as well as pointing out the possible missed opportunities in the new Convention. Special attention will be given to passenger liability, especially Art. 17 of the Warsaw Convention which unfortunately has not been subject to any substantial change in the Montreal Convention. The terms "accident" and "bodily injury" in Art. 17 have in practice caused much uncertainty and a jungle of jurisprudence. This paper will examine a range of cases, mainly from the US as the vast majority of aviation cases are brought in the US, in order to find answers to the questions. Questions this paper will attempt to answer include: "what is bodily injury" and "what is an accident". Is

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1 Finn Hjalsted, "Udviklingslinier i luftbefordrerens Passageransvar", U 1977 B 274.

2 Michael Milde, "Liability in International Carriage by Air - the new Montreal Convention of 28 May 1999", (1999) Unif. L. Rev. 1999-4, p. 835.

3 I.H.PH. Diederiks-Verschoor, "The liability of the Carrier under the Warsaw System", (1997) McGill University, Private International Air Law: *Cases and Materials, Vol. 1,* chapter III, 1. P. 57.

4 Michael Milde, *Supra* note 2, p. 835.

5 *Id.* p. 835.

compensation for mental trauma excluded? Does the term "accident" encompass any type of event or does the accident have to be related to the typical aviation risks?

The paper is divided into 7 chapters. Chapter 2 and 3 are to give an overview of the basic provisions of the Warsaw Convention where uniformity of law was achieved, the merits and shortcomings of this convention and the advantages of the new Montreal Convention. These chapters do not merely focus on liability rules, but also on other areas in the conventions where unity of law was achieved. Chapter 4 looks at exoneration of liability and the most disputed provision of the Warsaw System, namely the subject of limitation of liability which is the most important merit of the Montreal Convention. The chapter shall examine the problems that this limit causes in today's society and ways of exceeding it. The last part of the paper chapters 5 and 6 shall examine the terms "accident" and "bodily injury" as described above as well as the time period of the carrier's liability and the exclusiveness of the Warsaw Convention. Finally chapter 7 shall sum up the merits and shortcomings of the Warsaw System as well as the merits and missed opportunities of the Montreal Convention to attempt to give an answer to whether or not this new convention deserves ratification.

Chapter 2. The Warsaw System - an overview

2.1. Scope and Applicability

To understand and interpret the provisions of the Warsaw Convention, it is important to keep in mind the historical background of the convention. As stated above the Convention was made when the aviation industry was still in its infancy. Today, more than 70 years after its birth, the Convention is still of major importance. However, some of its provisions are outdated.

The purpose of the Convention was to create a certain degree of uniformity in the rules governing the carrier's liability in a field where conflict of law would otherwise constitute a major problem. By creating uniformity both the carrier and the passenger are able to foresee the risk and can make arrangements to insure themselves against possible losses. The purpose was also to protect, at that time, a financially weak industry and create an incentive for further development of the emerging aviation industry. Denmark implemented the Warsaw Convention into Danish law in 1937.[6]

The Warsaw Convention applies to international carriage of persons, baggage or goods for reward (Art. 1).[7] There exist a few exceptions to this applicability rule which I will not go into.[8]

There are many aspects of carriage by air that are not covered by the Warsaw Convention. However, to be sure that the scope of the convention

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6 Finn Hjalsted, "Luftbefordrerens kontraktansvar i international luftret", U 1957 B 1.

7 For the definition of international carriage see Art. 1(2).

8 See *e.g.* I H PH. Diederiks- Verschoor, *supra* note 3, Chapter III, 2.1. p. 59.

does not become even narrower, Art. 32 makes the Convention mandatory. Where the convention applies according to Art. 1 it cannot be contracted out of before the damage occurs. Neither can the carrier, in the contract or in a special agreement, infringe upon the rules laid down in the Convention. Furthermore, uniformity of law is made effective by providing (in Art. 24) that any action for damages can only be brought subject to the conditions and limits set out in the Convention.

2.2. Uniformity of Law

There is no unification of the entire spectrum of air law in the Warsaw Convention, but the Convention did achieve uniformity of law in several fields.

Firstly, uniformity was reached in the format and legal significance of the documents of carriage (Art. 3-16 of the Convention). These provisions are still essentially followed by the airlines today.[9] Under the Warsaw Convention the carrier has to deliver two tickets, one for the carriage of the passenger and one for the carriage of the luggage. The Convention contains detailed rules as for the contents of the ticket.

As for the legal significance of the ticket, Art. 3(2) states that even if no ticket is issued or if the ticket contains an inaccuracy the contract is still valid, and it is still subject to the rules of the Warsaw Convention.[10] However, the compliance with the formalities of the ticket has been sanctioned by the loss of limitation of liability by stretching the meaning of the Convention to absurdity. Furthermore, Art. 3(2) has proven to be an obstacle to the growing use of electronic data processing. It seems to leave no room for electronic tickets since it states that if the ticket has not been delivered, the carrier cannot avail himself of the provisions which exclude or limit his liability (see also chapter 5).

Secondly, uniformity of law was reached in the regime of liability which represents the core subject of the Warsaw Convention. The Convention only governs liability in contract, contrary to the Danish Transport by Air Act which makes a distinction between liability for third persons (§ 127), where the liability is a strict liability, and contractual liability.[11] The Convention governs liability for death, wounding and other bodily injury (Art. 17), destruction, loss of or damage to registered luggage or goods (Art. 18) and liability for damage to passengers, luggage and goods caused by delay (Art. 19). The legal basis of the liability of the carrier is fault/negligence but with a reversed burden of proof (Art. 20(1)).

In Denmark the legal basis for liability in contract for damaging actions is usually based on *culpa*.[12] However, for dangerous undertakings, as transport by air was in 1929, the basis of liability has been built on a "criteria of danger". This means that where the undertaking is accompanied by an expectable danger, the liability has traditionally been based on an

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9 Michael Milde, *Supra* note 2, p. 2.

10 I H PH. Diederiks- Verschoor, *Supra* note 3, Chapter III, 2.2.1. p. 62.

11 Henrik Specht, "Passageransvaret ved international lufttransport", U 1986 B 99.

12 Bernhard Gomard, "Obligationsret 2. Del", (1995) Jurist- og Økonomforbundets Forlag, p. 142.

increased or even strict liability.[13] The Warsaw Convention conforms with this "criteria of danger". The arrangement of the reversed burden of proof lifts a heavy burden from the claimant as it might, otherwise, prove difficult to provide the necessary evidence in a field of such technical complexity as aviation.

The reversed burden of proof reflects a *quid pro quo*, in the sense that the burden of proof was placed on the carrier to counterbalance the monetary limit of liability in Art. 22. The carrier is liable according to the limit fixed by the convention. For passengers the limit set out in the Convention is 125,000 francs.. In the Danish Transport by Air Act of 1937 the corresponding values were set out as 18,250 DKK for passengers. The limit of liability was deemed necessary in 1929 to protect the financially weak industry of aviation. However, the limit of liability soon turned out to be a major flaw in the convention leading to a jungle of jurisprudence. Not only does the limit contravene the basic rule in most jurisdictions of *restitutio in integrum,* it was also an unrealistic attempt to unify the costs of living in different countries.[14]

Finally, the possible conflicts of both laws and jurisdictions have been reduced by Art. 28 which provides for four different fora in the territory of one of the High Contracting Parties where the claimant can sue.

The Convention was drafted under influence of civil law and according to Art. 36. French is the sole official language of the convention. It was thought that by looking to one language for guidance in interpretation, the policy of uniformity would be achieved. This has instead proven to be an obstacle in that the court has to interpret the French text each time it has a problem in order to see if it is correctly translated.

2.3. Evolution of the Warsaw System

Although the Convention was considered to be one of the best agreements dealing with private international law, it did not stand unchanged. It went through a series of amendments and attempted amendments, as well as unilateral efforts and private agreements made to improve the Convention.

The Hague Protocol of 28 September 1955

The first amendment took place in 1955 and was prepared by ICAO. The most noteworthy change in the protocol was that the limit of liability for passengers was increased twofold, from 125,000 francs to 250,000 francs. The other changes were merely simplifying or clarifying the text of the Warsaw Convention. Some 116 states are party to the Hague protocol, but the USA never ratified it due to the limit of liability being too low. The Warsaw Convention as amended by the Hague Protocol was implemented into the Danish Transport by Air Act of 1960 as chapter 9. Contrary to the Danish Transport by Air Act of 1937 the Act of 1960 does not make a distinction between national and international carriage by air.

The Guadalajara Convention of 18 September 1961

This Convention arose from the fact that no definition of the word "carrier" was adopted in the Warsaw Convention. As the number of charter arrangements

[13] Henrik Specht, U 1986 B 99, *Supra* note 11.
[14] Michael Milde, *Supra* note 2, p. 837.

increased significantly it became necessary to clarify the term "carrier". This was not done in a protocol but in a Convention, because it was not a matter of revising old rules. The Guadalajara Convention supplements the Warsaw Convention. It makes a distinction between the contracting carrier and the actual carrier and states that both are considered as carriers under the Warsaw Convention.[15]

The Montreal Agreement of 1966

The Montreal Agreement is a private agreement and not part of international law making to amend the Warsaw Convention. It was concluded between the International Aviation Transport Association (IATA) airlines to convince the US government to withdraw its denunciation of the Warsaw Convention after unsuccessful attempts from ICAO to revise the Convention. The airlines agreed to increase the limit of liability to USD 75,000 (The limit under the Warsaw Convention was equal to some USD 8,300) and accepted a regime of strict liability. The agreement applies only to passenger liability and only to international flights where the USA is an agreed stopping place, place of departure or place of destination. It is noteworthy that the airlines succeeded where the governments of the world failed. Even though the agreement was a success in so far that it made the USA withdraw its denunciation, it was a failure in so far that it was the first step of many that destroyed the purpose of the Warsaw Convention to unify private international air law.

The Guatemala City Protocol of 8 March 1971

The Montreal Agreement of 1966 was a forerunner of a movement aimed at changing the regime of liability from a fault liability into a risk liability. The Guatemala City Protocol, a further amendment of the Warsaw System, adopted that change. It was the first time that the regime of strict liability without any defense was introduced in liability arising out of contract. The limit of liability was increased to 1,500,000 francs (some USD 100,000) and it was unbreakable. Furthermore the ticketing system was simplified making it possible to replace the tickets by an electronic record. The Guatemala City Protocol also introduced, for the first time, a fifth jurisdiction, namely the state of domicile or permanent residence of the claimant if the carrier has a place of business in that state. The Protocol could enter into force only if the USA ratified it. However, the USA was never successful in implementing a supplementary compensation fund[16] and therefore never ratified the Protocol.

The Additional Montreal Protocols Nos. 1, 2 and 3 of 25 September 1975

After the creation of the International Monetary Fund (IMF) in 1944, gold no longer was a yardstick of monetary values. Instead gold became just another commodity on the market where the market price could vary from the official price. Therefore the courts had major problems figuring out which of the two prices to rely upon.[17] To overcome this problem the Special Drawing Rights (SDR) were introduced as a new yardstick of values in 1969. The Montreal Protocols nos. 1, 2 and 3 replaced the gold value clause with the SDR for the Warsaw Convention, that Convention as amended by the Hague Protocol and as amended by the Guatemala City Protocol. Only Protocols no. 1 and 2 entered into force. They are ratified by 30 countries.

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[15] See on this subject M. Franklin, "Code-Sharing and Passenger Liability", Annals of Air & Space Law, Vol. XXIV, Number 3, 1999, p. 128.

[16] Art. 35 A permits the states to, under certain conditions, operate a system to supplement the compensation payable to claimants.

[17] See, *e.g. Olympic Airways v. Zacopoulos,* Court of Appeals of Athens, January 21, 1974; *Franklin Mint v. TWA,* US Court of Appeals (2nd Circ.) September 28, 1982, Annals of Air & Space Law, vol. VII (1982); *TWA V. Franklin Mint,* US Supreme Court, April 17, 1984, Air Law, Vol. IX (1984); and I H PH. Diederiks- Verschoor, *supra* note 3, Chapter III, 7, p. 100.

Montreal Protocol No. 4 of 25 September 1975
This Protocol amended the Warsaw Convention as amended by the Hague Protocol to strict liability for baggage and cargo. The Guatemala City Protocol only made this change for passengers. The Protocol also simplified the requirements for the air way bill, making it possible to replace the way bill by an electronic record. The Protocol entered into force 14 June 1998.[18]

Private Initiatives and Unilateral Action to Improve the System
The dissatisfaction with the Warsaw System keeps increasing as fixed limits of liability become more and more unacceptable with time (owing to inflation and the increased costs of living).

As ICAO made no new efforts to update the System, airlines and governments took matters in their own hands. Many airlines voluntarily increased their limit of liability as they were concerned that some developed countries would otherwise denounce the Warsaw Convention. The Malta Agreement was an undertaking of some European airlines and Japan to increase the limit of liability to the amount agreed to in the Montreal Agreement of 1966 and apply that limit also outside of the USA. The Italian Constitutional Court ruled that the limits in the Warsaw Convention were unconstitutional leading to Italy adopting a limit of 100,000 SDR for all carriers flying to, from or via Italy.

The Japanese airlines in 1992 adopted a two-tier liability system. Up to the sum of 100,000 SDR they would accept strict liability, and above that amount the liability would be based on fault/negligence with a reversed burden of proof. Under the Japanese initiative there is no limit of liability. The Japanese initiative lead to the 1995 IATA Intercarrier Agreement on Passenger Liability which is to accept in the airlines' tariffs the regime of the Japanese initiative. This agreement came into force on 14 February 1997. It is claimed that the airlines which have signed the agreement carry more than 80 per cent of all international transport of passengers.[19]

A further development of the IATA Intercarrier Agreement was the regional European step. The European Union proposed a Council Regulation on air carrier liability which was to become applicable to all the Member States from 17 October 1998. This Regulation in essence adopts the IATA Intercarrier Agreement and is applicable for all Community carriers on both domestic and international flights. It is peculiar why the EU made this Regulation as most of the European airlines were already members of the IATA Intercarrier Agreement and as the ICAO Diplomatic Conference was only a few months ahead. Apparently the EU preferred to make the Agreement a matter of law instead of leaving it to the contractual freedom of the airlines.

2.4. Conclusions

In 1929 when the Warsaw Convention was adopted, it was viewed as being a success, a major contribution to the unification of private international air law. Even today it deserves the uttermost respect as it has been the cornerstone of private international air law for almost a century, despite the rapid changes in the aviation industry and in the costs of living.

However time has been ripe for many years to replace the entire system with a convention that is up to date, benefiting from the merits of the old system and replacing the learned flaws of that system. The purpose of the Warsaw Convention was to create uniformity of law and to protect a weak and emerging aviation industry. However, the Warsaw System no longer fulfills the goal of uniformity, and the aviation industry is no longer a

[18] Michael Milde, *Supra* note 2, p. 840.
[19] Michael Milde, *Supra* note 2, p. 842.

weak and emerging industry that needs any special protection. The airlines themselves have agreed to a regime of no limit of liability and with a strict liability up to 100,000 SDR, so there seems to be no reason to preserve any limit of liability in the Convention. As for uniformity of law, the many attempts to update the Convention, both by protocols, private agreements and unilateral actions by states, have all lead to a disunification of law, obfuscating which rules actually apply to a given case.

When it comes to the rules governing the documents of carriage, the convention is outdated, making it impossible to use an electronic record or ticketless travel since the ticket has to be delivered to the passenger (art. 3).

The convention is authentic only in the French language, which was the universal diplomatic language at the time the Convention was adopted. It is not very expedient that the courts have to interpret the French text to see if it is correctly translated each time they has a problem to solve. Moreover, some of the terms that are used in the Warsaw Convention have caused enormous difficulties of interpretation and application (such as "accident" and "bodily injury" in art. 17 and "willful misconduct" in art. 25). Chapter 5, 6 and 7 will focus especially on the problems concerned with interpreting these words.

Chapter 3. The Montreal Convention of 28 May 1999

3.1. Introduction

This chapter is to examine if a new convention is really needed, and whether or not the new Montreal Convention fulfills the needs of the aviation industry and the traveling public in today's society.

The Montreal Convention is a new convention that stands on its own. It is not another amendment to the Warsaw Convention by a protocol, and it is not part of the Warsaw System. However, the Montreal Convention is not a convention of totally innovative rules that rebuilds the whole Warsaw System. It is essentially a composite of the Warsaw Convention, some of the protocols to the Warsaw Convention, the Guadalajara Convention and the IATA Intercarrier Agreement. One can ask, "why do we need a new convention when all the rules exists already?" Practice has proven that major changes can be made in the regime of liability without making any changes in the convention. This happened in the Montreal Agreement, the Malta Agreement and the IATA Intercarrier Agreement. However, these agreements were changes within the Warsaw System rather than to the System. It is only because the Warsaw Convention specifically permits the carrier to assume more liability (in Art. 22(1) and Art. 23) that the airlines were able to enter into these agreements. The mandatory nature of the Convention prohibits the airlines from making changes to the System, *e.g.* change the rules of jurisdiction or the ticketing system. Furthermore a state cannot unilaterally change any of the provisions in the treaty without it being a breach of its obligations under the treaty. To make changes to the Convention, the participation of sovereign states is necessary. Therefore, a

new convention is the only way of achieving the goal of uniformity of law and transparency.

By making a new Convention which has no limit of liability (as the new Montreal Convention), it is true that uniformity in the levels of compensation will not be achieved. This goal was originally sought in the Warsaw Convention by having a limit of liability that was too low, which would decrease the incentive for forum shopping. However, this uniformity was soon eliminated by finding creative ways of circumventing the limit, and by making collective special contracts. With no limit of liability, the plaintiff will obviously seek compensation wherever the award is highest.[20] Nevertheless, time has proven that no limit of liability is high enough, and it would be a mistake to try again to unify the levels of compensation. However, it is possible to make a uniform regime with a defined basis for the liability.

3.2. Scope and Applicability

The purpose of the Montreal Convention is to update and modernize the field of private international air law by taking the best elements from the Warsaw system and from the collective special contracts, and merging them into one single document to achieve uniformity of law and transparency once again. This has been needed for many years.

At this point the paper shall try to comment on some of the most significant aspects of the new Convention.

The Preamble to the Montreal Convention makes it clear that the Convention is no longer a convention to protect the airlines. It recognizes the importance of protecting the interest of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution.

No substantive changes has been made regarding the applicability of the Convention. Only does the Convention incorporate the Guadalajara Convention in chapter V.

Art. 49 states the mandatory nature of the Convention and has the same substance as the Warsaw Convention Art. 32. Any action for damages can only be brought subject to the conditions and limits set out in the Convention as was the case in the Warsaw Convention (Art. 29 in the Montreal Convention). However, to the text of the Warsaw Convention (Art. 24) a few words have been added in an attempt to clarify the exclusiveness of the Convention which had been disputed for years in the US courts (see chapter 5.5).

3.3. Uniformity

Chapter II in the Convention regarding the documents of carriage have been modernized and updated making electronic ticketing possible. The requirements for the format of the documents have been simplified in accordance with the Guatemala City Protocol (which never came into

[20] Richard Gardiner, "The Warsaw Convention at Three Score Years and Ten", Annals of Air & Space Law, Vol. XXIV, Number 3, 1999, p. 118.

force) and Montreal Protocol no. 4. The carrier is now allowed to deliver one single document for the passenger and the baggage.

The regime of liability has been substantially changed in the new Convention. With respect to death, wounding and other bodily injury to passengers, the basis of liability represents an innovation from the Warsaw Convention. The Montreal Convention has incorporated the IATA Intercarrier Agreement from 1995 such that we now have a two-tier liability system. Up to the sum of SDR 100,000 the carrier is strictly liable. Beyond that sum the liability is based on fault/negligence but with a reversed burden of proof. Even though the new Convention provides no limit of liability the compensations cannot be expected to be gigantically high; it must be remembered that the claimant will only be compensated for damage that is actually proven. The convention specifically excludes punitive or any other non-compensatory damages (Art. 29).

The Montreal Convention creates a separate liability regime for baggage and cargo. The carrier is strictly liable for damage sustained in the case of destruction, loss of, or damage to checked baggage (Art. 17(2)). In the case of unchecked baggage the liability regime is based on fault. For damage sustained in the event of destruction, loss of, or damage to cargo, the Montreal Convention incorporates the Montreal Protocol no. 4 of 1975 with some slight changes. The liability for delay in the carriage of passengers, baggage and cargo is based on fault with a reversed burden of proof.

While limits of liability no longer exists for death or bodily injury of passengers, the Convention retains the limits of the Guatemala City Protocol and the Montreal protocols no. 3 and 4 for delay, baggage and cargo.

Another important change in the Montreal Convention is in the rules on jurisdiction. A 5th jurisdiction has been inserted on request from the US delegation, namely the place of the claimants residence if the airline operates services and conduct its business from that place. The 5th jurisdiction is not an innovation. Already at the Guatemala City Conference the US insisted on a 5th jurisdiction. In fact, the Montreal Convention just gives back to the claimant the most logical jurisdiction deprived of claimants by the Warsaw Convention.[21]

The only major innovation in the new Convention is Art. 50 which provides that the States shall require their carriers to maintain adequate insurance, and that any State Party can require evidence of adequate insurance from carriers that operate into its territories.

Whereas the Warsaw Convention was only authentic in French, the new Montreal Convention is authentic in six languages.[22]

The Convention enters into force upon ratification by 30 states (Art. 53(6)), and it prevails over the whole Warsaw System between States Parties to the Montreal Convention. However, if some States that have ratified the Warsaw Convention do not ratify the new Montreal Convention, a problem of uniformity will persist. In that regard, the US has apparently reported that it will terminate any Warsaw Treaty relationship with those

[21] Michael Milde, *Supra* note 2, p. 857.

[22] English, French, Arabic, Chinese, Russian and Spanish.

States that have not ratified the Montreal Convention. This measure would facilitate convincing of States to ratify the new Convention.[23]

3.4. Conclusion

The Montreal Convention has taken the best features from the protocols to the Warsaw Convention and incorporated both the Guadalajara Convention and the IATA Intercarrier Agreement. It has put these features into one single document thus unifying the system of private international air law once again. The Convention is authentic in several languages meaning that the court does not have to interpret a French text each time it has a problem of interpretation to solve. The regime of liability overcomes all the problems caused by the limit of liability in the Warsaw Convention attempting to unify the costs of living in very different countries. It also conforms with the principle of restitution and with the focus that is put on consumer protection in today's society. The rules governing documents of carriage have been updated and simplified, thus making electronic ticketing possible and enabling airlines to extensively reduce their operation costs. Moreover, the Convention gives back to the claimant the most logical jurisdiction of all, the place of his or her residency.

The Convention is without any doubt an improvement from the Warsaw System.

Chapter 4. Exoneration and Limit of Liability

4.1. Exoneration of Liability

Art. 17 of the Warsaw Convention states that the carrier is liable for damage sustained in the event of death or wounding of a passenger or any other bodily injury suffered by a passenger if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking. From this statement it seems that the liability of the carrier is a strict liability. However, Art. 20 provides that the carrier is not liable if he proves that he and/or his agents have taken all necessary measures to avoid the damage or that it was impossible for (him or) them to take such measures. This makes it clear that the carrier has the burden of proof and that it is a heavy burden of proof since Art. 20 is an exception to Art. 17, and exceptions must be narrowly interpreted.

Another exception to Art. 17 is Art. 21 which provides that the carrier may be partly or wholly exonerated from liability in case the damage was caused by or contributed to by negligence of the injured person.

Accordingly the carrier may be exonerated from liability in two cases: 1) If the carrier proves that it has taken all necessary measures or that it was impossible to take such measures, 2) In the case of contributory negligence.

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[23] T.J. Whalen, "The new Warsaw Convention: The Montreal Convention", Annals of Air & Space Law, Vol. XXV Number I, 2000, p. 25.

4.1.1. All necessary measures

The burden of proof that Art. 20 puts on the carrier has proved difficult to lift. This is no wonder, as when looking at the wording of Art. 20, the liability seems in effect to be a strict liability. In reality the damage could not happen if the carrier took all necessary measures to prevent it. Accordingly, if damage was caused, all necessary measures can not have been taken. In this way the Article cancels out itself and is neutralized.[24]

However, it is clear that Art. 20 is not interpreted that way. Art. 20 was inspired by the Paris Conference on private international air law, which took place in 1925, where "all reasonable measures" (les mesures raisonables) was suggested. During the Conference in Warsaw in 1929 "les mesures raisonables" was changed to "toutes mesures nécessaires", but as this change was characterized as a "Question de Rédaction" and lead to no discussions, it is clear that no substantive change was intended.[25] Furthermore, cases interpreting Art. 20 have clarified that the carrier has to prove that it took all reasonable measures and not that it took all necessary measures.

In the case of *Grein v. Imperial Airways, Ltd.*[26] the court held that the air carrier had to prove that it had shown "all reasonable skill and care in taking all necessary measures to avoid damage…". In *Hannover Trust Co. v. Alitalia Airlines*[27] the court stated that "all necessary measures" really meant "all reasonable measures". In *Chrisholm v. British European airways*[28] the passengers had been instructed to take their seats and fasten their seat belts because of air turbulence. The claimant had despite the warning left her seat and was injured as she fell. The court stated that it was sufficient that the air carrier proved that he had "taken all reasonable care in warning the passengers", and thus the passenger's claim was denied.[29]

In the Danish Transport by Air Act of 1937 Art. 20 was worded such that it met the generally recognized translation. However, where the Convention is worded positively (the carrier must prove that he *did* take all necessary measures), the Danish Act (section 20) was worded negatively (the carrier must prove that he *did not* commit any errors and that he *was not* guilty of negligence). This can lead to a difference in interpretation. The wording of Art. 20 in the Convention leads to a more objective approach as to whether or not all necessary measures have been taken. The wording of the Danish Act does not leave the possibility to hold the carrier liable if, from an objective approach, the necessary measures have not been taken, but it must be assumed that the carrier did not commit any errors and was

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[24] Henrik Specht, U 1986 B 99, *Supra* note 11.

[25] Finn Hjalsted, "International Luftret", TfR 1958, s. 60.

[26] *Grein v. Imperial Airways, Ltd* ,King's Bench Division 23 Oktober 1935; Court of Appeals 13 July 1936, *see Law Reports* (1937) 50-92.

[27] *Hannover Trust Co. v. Alitalia Airlines,* 14 Avi. 17.710 (A.D. N.Y. 1977).

[28] *Chrisholm v. British European airways,* 1. Lloyd's Rep. 626 (Manchester Assisez, (1963).

[29] Henrik Specht, U 1986 B 99 f, *Supra* note 11.

not guilty of negligence.[30] Furthermore, the Convention states more clearly than the Danish Act who has the burden of proof. In the Danish Transport by Air Act of 1960 the wording was changed. The Act of 1960 (section 109) constitutes a more direct translation of Art. 20 of the Convention.

One of the characteristics of air travel is unresolved accidents. Sometimes the cause of the accident cannot be traced because there are no survivors of the plane accident to tell what happened, and the pilot might not have had the time to make a call over the radio prior to the accident. Is the carrier liable under Art. 20 when the cause of the accident cannot be traced? In the literature the opinions differ.

According to Lemoine[31], Litvine[32], Chauveau[33] and Goedhuis[34] the carrier does not have to explain the cause of the accident to prove that he and his agents took all necessary measures. It is sufficient to prove that the aircraft took off well equipped and with well qualified personnel on board.

To the contrary Riese[35] is of the opinion that for the unresolved accident the air carrier is liable for damages up to the limits of the Warsaw Convention, because it is presumed that all necessary measures have not been taken, and the carrier in an unresolved accident is not able to prove that he and his agents are not to blame.

The latter view has been followed in the majority of the cases. In the cases *Grein v. Imperial Airways, Ltd*[36]*., Flohr v. K.L.M*[37]*.* and *Wyman and Bartlett v. Pan American Airways, Inc.*[38], the courts used the same reasoning as Riese in arriving at this conclusion.[39]

This result also seems to be the obvious consequence of putting the burden of proof on the carrier, because otherwise the carrier would try to prove that the cause of the accident cannot be traced which leaves the passenger with the problem of tracing the accident. This would be contrary to the reasons for placing the burden of proof on the air carrier.[40]

At the Conference in Haag in 1955 it was suggested that the wording of Art. 20 be changed to make clear that in the case of an unresolved accident it is presumed that all necessary measures have not been taken. This suggestion was not adopted in the Haag Protocol, but it is clear from the negotiation at the conference that the vast majority of the delegates shared this view on the subject of burden of proof in unresolved accidents.

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30 See also Finn Hjalsted, TfR 1958, s. 68, *Supra* note 25.

31 Lemoine, "Traité de Droit Aérien"*,* Paris 1947, no. 815-821.

32 Litvine*,* "Précis élémentaire de Droit Aérien"*,* Bruxelles 1953, no. 287-304.

33 Chauveau, "Droit Aérien"*,* Paris 1951 no. 331-341.

34 Goedhuis, "La Convention de Varsovie"*,* Haag 1933, 173-195.

35 Riese, "Luftrecht"*,* Stuttgart 1949, 454-461.

36 *Grein v. Imperial Airways, Ltd., Supra* note 26.

37 *Flohr v. K.L.M.,* Archiv für Luftrecht (1939) 180-189 and 189-192.

38 *Wyman and Bartlett v. Pan American Airways, Inc.,* Supreme Court of New York County, 25 June 1943, United States Aviation Reports (1943) 1-4.

39 For cases reaching the opposite conclusion see: *Palleroni v. S.A. Navigazione Aerea,* Revue Générale de Droit Aérien, (1939) 309-318; *Ritts v. American Overseas Airlines, Inc.,* United States District Court, Southern District of New York, 17-18 Jan. 1949, *see United States Aviation Reports* (1949) 65-71.

40 Finn Hjalsted, TfR 1958 s. 52-63, *Supra* note 25.

Recently there have not been many judgments on Art. 20, as most cases in private international air law are brought in the US where the Montreal Agreement has been in force since 1966. The Montreal Agreement, as stated earlier, adopted strict liability for the air carriers. Furthermore, since 1995 the vast majority of the airlines in the world have been part of the IATA Intercarrier Agreement, which regime of liability has also found its way into the new Montreal Convention.

The regime of fault/negligence with a reversed burden of proof is still in force in the Montreal Convention for claims exceeding SDR 100,000.The Montreal Convention Art. 21(2)(a) and (b) provides that the carrier must prove that the damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents, or that it was solely due to the negligence or other wrongful act or omission by a third party. These two alternatives seem to state the same assertion. If the carrier proves that someone else was the sole cause of the damage, then it has at the same time proven that the damage was not due to any negligence, wrongful act or omission of the carrier and vice versa. It remains to be seen how the jurisprudence will evolve based on this new provision. Whether the lower threshold will represent a benefit for the carrier in reality as well as in theory is doubtful. It will be difficult for the airline to prove that it did absolutely nothing wrong.[41] The expression "solely" narrows the defense of the carrier as it is not enough that a third person merely contributed to the damage.

From a political standpoint it can be asked, what would be the more appropriate solution, a strict liability or a fault liability with a reversed burden of proof? An aviation lawyer, Lee S. Kreindler, who has played a role in many aviation cases, has stated that it is very important to maintain the fault system.[42] He is of the opinion that the airlines can only keep safe and functioning properly through a system, where the carrier must unravel the cause of the accident to prove that all necessary measures were taken. However, such a system leads to more costly and time-consuming litigation than a system based on strict liability. Moreover, in a system based on strict liability, the airline/aviation industry would still be interested in unraveling the cause of the accident and making improvements in aviation security since, after all, it is the airline which must pay when things go wrong. The system of the Montreal Convention provides a major benefit for the consumer.

4.1.2. Contributory Negligence

The carrier can also be exonerated from liability by proving contributory negligence. Art. 21 of the Warsaw Convention provides that the carrier will be wholly or partly exonerated if he proves that the damage was caused by or contributed to by the negligence of the injured. In some of the few cases where the carrier has been exonerated from liability both Art. 20 and Art. 21

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41 T.J. Whalen, *Supra* note 23, p. 19.

42 R.M. Jarvis & M.S. Straubel, "Litigation with a foreign Flavor: A Comparison of the Warsaw Convention and the Hamburg Rules", Journal of Air Law and Commerce (1994), 911-914.

could be argued, as usually the carrier in these cases is able to prove that the damage is caused by the negligence of the passenger and that he has taken all necessary measures to avoid the damage. An example is *Chutter v. KLM Royal Dutch Airlines & Allied Aviation Services International Corporation*[43] where a passenger, wanting to say farewell to her family, ignored the "fasten seat belts" sign, fell out of the aircraft and injured her leg as she did not notice that the stairway leading to the aircraft had been removed. In this case the carrier was not held liable.

According to Art. 21 c, in the case of contributory negligence, the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from liability. This does not contribute to the unification of law that the Convention wished to achieve. In some common law states the claimant cannot obtain any compensation if he contributed to the negligence. The provision has been changed in the Montreal Convention. Art. 20 no longer refers to *lex fori* and the court seized no longer has an option but an obligation to exonerate the carrier to the extent that the damage was caused by contributory negligence. The defense of contributory negligence can explicitly also be used for the first tier of liability up to SDR 100,000. This clarifies that the strict liability of the Montreal Convention is only a stringent liability and not an absolute liability. The carrier is not placed in the same position as an insurer.[44]

4.2. Limit of Liability

In the Warsaw System there exist various different limits of liability (Art. 22). For the countries that have ratified the Warsaw Convention as amended in Hague (as has Denmark), the limit for death or bodily injury is SDR 250,000. For countries that have not ratified the Hague Protocol the limit is only SDR 125,000. For carriage where the US is place of departure, place of destination, or intermediate stopping place, the limit is USD 75,000 (the Montreal Agreement), and for the airlines that are part of the IATA Intercarrier Agreement, the liability is unlimited as is the case in the new Montreal Convention which is not yet in force. The situation can get rather complicated

As stated above in chapter 2, the justification for adopting a limit was the necessity to protect a financially weak aviation industry. The argument was that one case could wipe out the entire industry, and that such a catastrophic risk should not be carried by the industry alone but should be shared by the participants. The limit of liability would be an incentive for further development of the aviation industry. Another argument was that the carrier should know how much to pay in advance such that it, as well as the passenger, could properly insure itself. Moreover, the limit was supposed to contribute to the unification of international law, and it was thought to be a *quid pro quo* for the reversed burden of proof.

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[43] *Chutter v. KLM Royal Dutch Airlines & Allied Aviation Services International Corporation,* US District Court, Southern District of New York, June 27, 1955, (1955) USAvR 250, (1956) JALC 232, *Avi*, Vol. 4, p. 177,733.

[44] Michael Milde, *Supra* note 2, p. 855.

None of these arguments seem very convincing in today's society. The aviation industry is no longer a financially weak industry, and most of the worlds airlines have by their own initiative agreed to an unlimited liability. Furthermore, the airlines always insure themselves to the hilt despite the limit of liability, because the Warsaw Convention does not apply to every carriage by air, and where the Convention does not apply, the carrier might face unlimited liability. Additionally, it is impossible to unify the costs of living in different countries. Finally the limit of liability violates the basic principle of restitution and has turned out to be incompatible with the focus that is put on consumer protection in today's society.[45] Art. 22 has been a thorn in the heel of the Warsaw Convention. Claimants use any type of arguments to avoid and exceed the limit, and the courts find various ways of getting around it.

The Warsaw Convention provides two possibilities for getting around the limit of liability for death or injury to passengers:
(1) If the damage is caused by the carrier's wilful misconduct, or such default as is considered to be equivalent to wilful misconduct (Art. 25). This point is examined in more detail below in section 4.2.2.
(2) A. In the absence of a passenger ticket (Art. 3, para. 2). This point is examined in more detail in section 4.2.1.

4.2.1. Default in Ticketing

The last sentence in Art. 3(2) of the Warsaw Convention states, "Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this Convention which exclude or limit his liability".

Unfortunately, the Warsaw does not give any definition of a ticket, which makes it more difficult to ascertain when a ticket has been delivered. To determine what the ticket purports to be, it is necessary to consider the purpose of it under the Warsaw Convention. The ticket may have three essential purposes. Firstly, the ticket can be the contract of carriage. Secondly, it can be a means to give notice to the passenger that the carriage is covered by the Warsaw Convention. Thirdly, it can be evidence of the contract of carriage..

Art. 3(2) first sentence rules out the first possibility as it provides that the absence, irregularity or loss of a passenger ticket shall not affect the existence or validity of the contract of carriage. This clarifies that the ticket is independent from the contract of carriage.

Earlier interpretations of Art. 3 took the view that it did contain a notice requirement, to the effect that if no notice was provided, the carrier could not claim limitation or exclusion of his liability. The argument was, that as a natural counterpart to the limit of liability in the Convention, the passenger should be sufficiently informed so that he could take out additional insurance or decide to take another mode of transportation.

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[45] Class notes from a course in Private International Air Law at McGill University, taught by professor Michael Milde.

In *Mertens v. Flying Tiger Line, Inc*[46], the passenger ticket, which was delivered to a military passenger when the passenger was already seated on the airplane and on which the limitation of liability was almost unreadable and unnoticeable, was not delivered in compliance with Art. 3(2). As a consequence, the limitation of liability was not available to the airline. The court stated that the delivery requirement of Art. 3(2) would make little sense if it could be satisfied by delivering the ticket to the passenger when the aircraft was several thousand feet in the air.

In *Warren v. Flying Tiger Line*[47]*, Inc.* no ticket was issued, but a boarding ticket was passed out to the servicemen at the foot of the ramp to the plane, which made reference to the Warsaw Convention both on the front and on the back of the ticket. The court was of the opinion that the acceptance of the passengers took place upon boarding, and if Art. 3(2) was to be understood literally the ticket had been delivered when accepting the passenger enabling the carrier to limit its liability. However, the court held that the purpose of the delivery requirement is the notice, which in effect becomes without value if the passenger does not have time to read it and take out additional insurance before the plane takes off. Art. 3(2) was therefore not satisfied.

In *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*[48] the passenger had obtained the ticket days before takeoff, but as the notice was printed in microscopic letters, it was deemed insufficient and the airline could not exclude or limit its liability under the Convention.

The method in these US-cases of interpreting Art. 3(2) is to read para. 2 in conjunction with para. 1, so that the delivery of a ticket with the contents established in para. 1 is required to satisfy para. 2. The main purpose of this interpretation was, of course, to avoid the limit of liability. The courts in the rest of the world did not seem to take this approach but took a more literal approach in the interpretation of Art. 3.

Today the approach in the US is more in line with the rest of the world after the case of *Chan v. KAL.*[49] In this case the court followed a strict literal approach providing that para. 1 and 2 are to be read separately. Para. 2 does not refer to the content of the ticket but only to the delivery of the ticket. The majority found support for this interpretation in the fact that Art. 4 about baggage checks and Art. 9 about air waybills do contain a notice requirement, and as Art. 3 does not, it is implied that passenger tickets are not subject to a notice requirement.[50] After the *Chan* case it can be concluded that the ticket is simply evidence of the contract.

The consequence of not delivering a ticket under the Warsaw Convention is that the carrier is not entitled to avail himself of those provisions which exclude or limit his liability. These provisions are to be

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46 *Mertens v. Flying Tiger Line, Inc (1965) A.Ct..,* 341 F. 2d 851 (2d Cir. 1965).

47 *Warren v. Flying Tiger Line (1965) A.Ct.,* 352 F. 2d 494.

48 *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.(1966) A.Ct.,* 370 F. 2d 508.

49 *Chan v. Korean Air Lines (1989),* 490 U.S. 122, 109 S.Ct. 1676.

50 P. Lyck & B. A. Dornic, "Electronic Ticketing under the Warsaw Convention: Going ticketless on International Flights", Annals of Air & Space Law, Vol. XXII, Number 1, 1997, p. 20.

found in Chapter three of the Convention. This is not just Art. 22, which limit the liability of the carrier, but also Art. 20 (the "all necessary measures" defense) and Art. 21 (contributory negligence). This is a quite serious sanction.

The Hague protocol amends Art. 3 in two ways. Firstly, Art. 3(2) in the Hague Protocol does contain a notice requirement. Secondly, the sanction for non-delivery is limited to Art. 22 of the Warsaw Convention. Unfortunately though, the US did not ratify this protocol, and most aviation cases are brought in the US.

The Montreal Convention evades the problem by having an unlimited liability. Art. 3 of the Montreal Convention does contain a notice requirement, but it is not sanctioned. The Danish Transport by Air Act from 1985 section 92 correspond to the Hague Protocol Art. 3.

4.2.2. Willful Misconduct

Art. 25 of the Warsaw Convention is a safety clause under which unlimited liability in special circumstances can be invoked, namely in the event of damage resulting from the carrier's "wilful misconduct or by such default … as …, is considered as equivalent to wilful misconduct". The authentic text of the Convention, which is French, uses the words "dol" and "faute … équivalente au dol". Unfortunately the French and the English text do not cover the exact same concept. The word "dol" means an act deliberately performed with the intent to cause damage, whereas "wilful misconduct" is characterized as an act deliberately performed with knowledge that damage may be caused, but without having necessarily intended to cause damage. Accordingly, the definition of "wilful misconduct" is broader than that of "dol".

Art. 25 also includes such default as, according to the law of the court seized, is considered as equivalent to wilful misconduct. Here the uniformity of law is broken. Some countries treat gross negligence (faute lourde) as equivalent to "dol". This is a tradition in civil law countries. Other countries, such as Brazil, do not treat gross negligence as equivalent to "dol". In common law countries the term "wilful misconduct" goes far beyond even gross negligence. In those countries the expression "équivalente au dol" has no relevance.[51] Art. 25 thus leaves room for quite a bit of forum shopping.

In the Danish Transport by Air Act from 1937 Art. 25 was translated as "… forsæt eller … grov uagtsomhed,…" (translation: "intent or … gross negligence").

Art. 25 has caused a confusion of terminology which has shown in the jurisprudence where a variety of different interpretations exist. In *Horabin v. British Overseas Airways Corporation* "wilful misconduct" was defined as follows: "To be guilty of wilful misconduct the person concerned must appreciate that he is acting wrongfully … and yet persist in so acting … regardless of the consequences, and acts … with reckless indifference as to what the result may be".

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[51] I.H PH. Diederiks- Verschoor, *supra* note 3, Chapter III, 3, p. 89.

In the case of *American Airlines v. Ulen*[52] wilful misconduct was defined as "a deliberate purpose not to discharge some duty necessary to safety".

Piamba Cortes v. American Airlines[53] states that three alternative ways of establishing wilful misconduct has been identified: 1) Intentional performance of an act knowing that the act is likely to result in injury or damage; 2) An action taken with "reckless disregard" of the consequences; or 3) A deliberate failure to discharge a duty necessary to safety. The US courts have not come to any agreement on whether "reckless disregard" envisions a subjective or an objective test; Is it enough that the air carrier or its agents should have known that the conduct was likely to harm the passengers, or is knowledge required that damage would probably result? Jurisprudence continue to go in the direction of requiring knowledge that the carrier placed its passengers at risk of damage.[54]

US courts have had some problems applying their various definitions of wilful misconduct in practice, or in other words, they have been quite creative in fitting situations into a definition of wilful misconduct that seems far outside the generally accepted scope of wilful misconduct. The growing dissatisfaction with the limit of liability has lead to US courts permitting the breaking of the limit for wilful misconduct even in cases where the carrier had no control over the unlawful act.[55]

An example is the *Lockerbie* case where a piece of luggage contained a time bomb. Evidence indicated that the bomb came in from Malta on Air Malta flight KM 180 from Malta to Frankfurt and was transferred to Pan Am 103 in Frankfurt. Pan Am had neither permission nor jurisdiction to check the luggage, a task done by the national authorities in the airport. Despite this fact Pan Am was found guilty of wilful misconduct and it even had to pay punitive damages!

In the view of all the various interpretations of Art. 25 the Hague Protocol clarified the interpretation. Art. 25 in the Protocol states that the limits of liability in Art. 22 do not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly, and with knowledge that damage would probably result. The merits of this rule is that it is more precise and that it contains elements of both "dol" and "wilful misconduct". Furthermore, it no longer refers to the law of the court seized. However, the problem still remains of whether a subjective or an objective approach should be taken in determining if the act or omission was done recklessly and with knowledge that damage would probably result. The French courts have opted for the objective test, where the carrier is liable if it "could not fail to be aware of the risk"(*Emery v. Sabena*[56]*)* or if it "must have been

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[52] *American Airlines v. Ulen (1949) A.Ct*., 186 F. 2d 529, 87 U.S.App.D.C. 307.

[53] *Piamba Cortes v. American Airlines (1999) A. Ct.,*177 F. 3d 1272; 1999 A.M. C. 2286, 12 Fla. L. Weekly Fed. C 947.

[54] See *e.g. Republic Nat. Bank v. Eastern Airlines, Inc.,* 815 F.2d 232, 239 (2d Cir. 1987).

[55] Michael Milde, "Warsaw Requiem or Unfinished symphony?"*,* The Aviation Quarterly 1996, p. 40.

[56] *Emery v. Sabena (1968),* 22 RFDA 184.

aware" (*Air France v. Moinot*[57]). However, other countries lean towards the subjective test.[58]

Art. 25 of the Hague Protocol has been incorporated into the Danish Transport by Air Act of 1960 section 113 which uses the words "forsæt eller groft uagtsomt, vidende om at skade sandsynligvis ville blive forårsaget" (translation: "intent or gross negligence knowing that damage would probably be caused"), which corresponds with both the English and the French version of the Hague Protocol.

The Montreal Convention, for passenger liability, solves the trouble caused by Art. 25 by having the regime of unlimited liability. It has no effect on compensation whether or not the act was caused by the carrier's wilful misconduct, because the claimant will recover actual proven compensatory damages without any limit (including damage above SDR 100,000 unless the carrier successfully invokes the "all necessary measures" defense), but nothing more, as the convention explicitly excludes punitive damages.[59] This can be expected to make litigation much more expeditious and thus help overcome the problem of victims having to wait for many years for compensation. However, the limits for delay and for baggage are still breakable in case of wilful misconduct.[60]

Chapter 5. The Events for which the Air Carrier is Liable

5.1. Introduction

To obtain any compensation under the Warsaw Convention it is not enough that the carrier is unable to prove that he took all necessary measures. According to Art. 17 of the Convention the claimant has to prove that damage is sustained, the amount of the damage sustained, that the damage was caused by an accident, and that this accident took place on board the aircraft or in any of the operations of embarking or disembarking.

Art. 17 has caused tremendous problems for the courts. To this day it is still not clear which events amount to an accident. This chapter shall examine the American jurisprudence concerning the word accident, what the problems are and how they are solved. Unfortunately this issue is not resolved in the Montreal Convention. Therefore the jurisprudence is going to continue to be of major relevance even when the new Convention is in force.

5.2. What constitutes an Accident?

Art. 17 provides no definition of the word "accident". Only is it clear that the damage is not the accident but the result of an accident. Art. 18, which imposes liability for destruction or loss of luggage and goods, uses the word

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[57] *Air France v. Moinot (1976),* 30 RFDA 105.

[58] See *e.g.*, the Belgian Supreme Court in *Tondriau v. Air India (1977),* 31 RFDA 193, and the Swiss Supreme Court in *Lacroix Baartmans Callens Und Van Tichelen v. Swiss Air (1974),* 28 RFDA 75.

[59] See Article 29.

[60] See Article 21(5).

"occurrence" instead of the word "accident". This implies that "accident" by the drafters of the Convention is understood to mean something different than "occurrence".

The dictionary defines "accident" as "a happening that is not expected, foreseen, or intended", or "an unpleasant and unintended happening, sometimes resulting from negligence, that results in injury, loss, damage, etc.".[61]

In *DeMarines v. KLM*[62], the court defined an accident as "… an event, a physical circumstance, which unexpectedly takes place not according to the usual course of things."

In the *Saks*[63] case the US supreme court tried to clarify the meaning of the word "accident" by stating that "liability under Art. 17 arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger, and not where the injury results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, in which case it has not been caused by an accident under Article 17." The Court further provided that "This definition should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries." The definition in the *Saks* case is, as discussed in the case, similar to the German, British and French definition, which emphasize that the passenger's injury be caused by a sudden or unexpected event other than the normal operation of the aircraft and which is external to the passenger.[64]

At the Guatemala City Conference an amendment of Art. 17 was approved to the effect that liability would be imposed on the carrier for an "event" rather than an "accident", but would exempt the carrier from liability if the death or injury resulted "solely from the state of health of the passenger." The statements of the delegates at the Guatemala City Conference indicated that they viewed the word "event" as being wider in scope than the word "accident", thus expanding the scope of the carrier's liability.

For Denmark this amendment did not constitute any change since the word "accident" was translated to the word "begivenhed" (which essentially means "event") in the Danish Transport by Air Act from 1960 section 106. It is remarkable that the Danish Act uses the word "begivenhed" both in Art. 17 and Art. 18 (sections 106 and 107 respectively); The delegates at the Warsaw Conference, by using the word "accident" in Art. 17 and the word "occurrence" in Art. 18, implied that the scope of liability of the carrier is different with respect to passengers as supposed to luggage and goods. Furthermore, since the word "begivenhed" is broader in scope than the word "accident", it could be feared that the Danish courts would find the carrier liable for acts which could not be considered accidents. There is not yet any

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61 *Webster's New World Dictionary of American English,* (3d ed. 1991).

62 *DeMarines v. KLM (1978) A.Ct.*, 580 F.2d 1193.

63 *Air France v. Saks (1985),* 470 U.S. 392, 105 S.Ct. 1338.

64 See also Louise Cobbs, "The Shifting Meaning of "Accident" under Art. 17 of the Warsaw Convention: What did the Airline know and what did it do about it?", Air and Space Law, Vol. XXIV Number 3 1999, p. 123.

Danish jurisprudence on section 106 in the Danish Act. However, it must be remembered that the French text is the original text and the Danish Act therefore has to be interpreted in accordance with that text (see the Vienna Convention on Treaties). It is not possible to obtain any answer to the question why Denmark translated the word "accident" to the word "begivenhed", except that this was how it was translated upon Denmark's ratification of the Convention in 1937.[65] It must be a mistake.

The Montreal Convention maintains the vague and ill definable term "accident" instead of the wider Guatemala term "event". The definition of "accident" provides no answer to the question of whether the accident has to be related to the inherent risks of aviation or if any accident triggers the carrier's liability. The courts have had major problems applying the definitions in practice (as shown in section 5.5).

5.3. When must the Accident Take Place?

As stated above in the introduction to chapter 5 the time period for the carrier's liability is limited to accidents taking place on board the aircraft or in the course of embarking or disembarking. It is the injured person who has to prove that the accident took place during this time period. The exact demarcation of the time period is not made clear in Art. 17, but it is generally accepted that the liability begins when the passenger is put in the care of an employee of the carrier and ends when the passenger enters the arrival hall at the point of destination.

5.3.1. On Board the Aircraft

If a passenger suffers injuries caused by an accident which took place during the flight, the damage is covered by Art. 17. The same is true if the accident happens before take-off or after landing, while the passenger is on board the aircraft. However, the carrier is also liable if the accident took place on board the aircraft but without any direct connection to the flight.

In *Herman v. TWA*[66] an aircraft was hijacked, diverted to the Middle East and forced to land in the desert near Amman, Jordan. For six days the passenger and crew members were held captive on or near the aircraft, whereupon they were taken to a hotel and the following day released. The airline argued that it was not liable because the damage was caused while the aircraft was used as a detention camp after the flight had come to an end. The court refused the argument and stated that the events together made one continuous accident.

In the similar case of *Husserl v. Swiss Air Transport Company*[67] the court stated that the drafters of the Convention undoubtedly assumed that "on board the aircraft" meant from the time of embarkation at the place of origin to the disembarkation at the scheduled place of destination. The court further stated that it would be extremely difficult to distinguish between the

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[65] See the letter I obtained from The Danish Aviation Department ("Statens Luftfarts-væsen") in Annex 1.

[66] *Herman v. Trans World Airlines (1972)*, 12 Avi. 17,634 (1972) and 12 Avi. 17,304.

[67] *Husserl v. Swiss Air Transport Company (1975) D.Ct.,*388 F. Supp. 1238.

injuries caused by an accident on board the aircraft and the injuries caused by events not taking place on board the aircraft.

5.3.2. In the Course of Embarking or Disembarking

In *Evangelinos v. TWA*[68] the court stated that in determining if the accident took place in course of embarking or disembarking, three factors are primarily relevant, "location of the accident, activity in which the injured person was engaged, and control by defendant of such injured person at location and during the activity taking place at the time of the accident." This three-part test was first set down in *Day v. TWA*.[69] The court further stated that "control remains at least equally as important a factor as location and activity but is also integral factor in evaluating both location and activity". The case was about a terrorist attack which took place while airline passengers were assembled in an airport transit lounge to undergo the physical and handbag search prior to boarding the flight. The court found that the passengers were in the course of embarking, because the air carrier had begun to perform its obligations as carrier, and, by taking control of the passengers, had assumed responsibility for their protection. The place of the accident is thus only one of the factors to be considered.[70]

Similarly, the court in the parallel case of *Day v. TWA*[71] held that the passengers were in the course of embarking. The passengers "were not free agents roaming at will through the terminal."

In *Air-Inter v. Sage,*[72] taken from among cases decided by French courts, the court came to the conclusion that the passenger was not in the course of embarking. A passenger slipped and fell in an airport entrance hall because of whisky spilt on the ground by a previous traveler. As the entrance hall is a public place beyond the control of the carrier, the process of embarkation was not considered to have commenced.

MacDonald v. Air Canada[73] treated the word disembarkation. The court declined to interpret Art. 17 as covering an elderly passenger who fell while standing near the baggage "pickup" area waiting for her daughter to recover her luggage. Mrs. MacDonald was not acting under the direction of the airlines since she was free to move about the terminal, neither was she performing an act required for embarkation or disembarkation.

In a recent case, *Moses v. Air Afrique,*[74] the court referred to the three-part test (activity, location and control) set down in *Day v. TWA*[75] and stated that passengers are not in the course of disembarking when they are injured in the public areas of transport terminals, and similarly that they have finished disembarking after clearing immigration, on their way to or already in the baggage claim areas. A passenger who was assaulted by Air Afrique

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68 *Evangelinos v. TWA (1977) A. Ct.*, 550 F.2d 152.
69 *Day v. TWA (1975) A.Ct.*, 528 F.2d 31.
70 See also I.H PH. Diederiks- Verschoor, *supra* note 3, Chapter III, 2.7., p. 74.
71 *Day v. TWA (1975) A.Ct., Supra* note 69.
72 *Air-Inter v. Sage Et A.l.,* Cour d'Appel de Lyon (France), Feb. 10, 1976; (1976) RFDA 266, Schoner's case law digest *Air Law,* Vol. II (1977), p. 229.
73 *MacDonald v. Air Canada (1971) A.Ct.*, 439 F.2d 1402.
74 *Moses v. Air Afrique (2000) D.Ct.,* 2000 WL 306853 (E.D.N.Y.).
75 *Day v. TWA (1975) A.Ct.*, *Supra* note 69.

personnel in the baggage claim area did thus not have any cause of action under Art. 17.

As can be seen from the above analysis, the three-part test of *Day v. TWA* has been followed in a number of later cases treating "embarking and disembarking". However, this test has undergone a great deal of criticism. It has been argued that Art. 17 was not meant to cover damages caused by accidents in the terminal building, and furthermore, that it was meant to cover only the inherent risks of aviation.[76]

However, the Warsaw drafters wanted to create a system of liability that would cover all hazards of air travel. A rigid location-based rule would not adequately serve that purpose. The risks of air travel do commence when the air carrier takes control over the passengers, and furthermore, it is at this stage that the air carrier starts fulfilling his obligations according to the contract. It therefore seems reasonable to focus on the control of the carrier (and in that control test look to activity and location of the passenger) when determining the time period of the air carrier's liability.

The Danish Transport by Air Act section 106 uses the words "under indstigning eller udstigning" (translation: "during embarkation or disembarkation"). Literally these words lead to a more narrow time period of liability. The motives to the 1960 Act state that it encompass the time from when the passengers leave the airport building to board the plane and the time from when the passengers leave the aircraft to when they arrive at the terminal building.

5.4. The Exclusiveness of the Warsaw Convention

Art. 24 of the Warsaw Convention states: 1)"In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention", and 2) "In the cases covered by Article 17 the provisions of the preceding paragraph shall also apply…."

For many years the courts in the US have been divided as to the question of whether or not Art. 24 provided the exclusive remedy for passengers who sustained injury on board an aircraft in international transport by air. Because of the low limits of liability in the Warsaw Convention, plaintiffs have argued that the Warsaw Convention does not provide the exclusive remedy, and that if the conditions of Art. 17 were not met, local law would govern the plaintiffs claim, which in many cases would lead to unlimited liability.

In many cases the courts interpreted Art. 24 as not providing the exclusive remedy. An example is *Husserl v. Swiss Air Transport Company*[77], where the court put focus on the words "covered by Art. 17" in Art. 24(2) and stated "assuming … that the plaintiffs claim is 'covered' by Art. 17, Art. 24 clearly excludes any relief not provided for in the Convention. It does not, however, limit the kind of cause of action on which

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[76] See *e.g.,* L. Adams Jr. in Journal of International and Comparative Law 1976, p. 600 ff.; C. Tomeny in Brooklyn Journal of International Law 1976, p. 48 ff.; University of Pennsylvania Law Review 1976-77, p. 114 ff.

[77] *Husserl v. Swiss Air Transport Company (1975) D.Ct., Supra* note 67.

the relief may be founded; rather it provides that any action based on the injuries specified in Art. 17, 'however founded' (i.e. regardless of the type of action on which the relief is founded), can only be brought subject to the conditions and limitations established by the Warsaw system." In other words if the injury occurs as described in Art. 17, the Convention provides the exclusive remedy. The court further stated that causes of actions based on types of injuries not covered by the Convention should be governed exclusively by the substantive law which would apply if the treaty did not exist.

In *Abramson v. JAL*[78] the court held that the plaintiffs injury was not caused by an accident but by an internal condition, and that therefore the claim was not based on the Warsaw convention but on local law. The limit of liability in the Convention would thus be inapplicable.

These interpretations led to the airlines arguing that an accident had occurred in order to take advantage of the limit of liability in the Warsaw Convention, which do not apply under local law in the US.[79]

However, circumstances have changed since these cases to the effect that airlines no longer claim that an accident has occurred. Firstly, most of the world's airlines in 1995 became part of the IATA Intercarrier Agreement. This means that passengers would no longer have the same interest in applying local law instead of the Warsaw Convention, as they are now assured adequate compensation, and applying local law might mean that passengers have the burden of proving negligence of the carrier. Furthermore, the carrier would not be as interested in claiming that an accident had in fact occurred, as it would face strict liability up to SDR 100,000 and unlimited liability, whereas under the applicable local law there might not be strict liability.

Another change is the Montreal Protocol no. 4, which in the US entered into force on 4 March 1999. This provided a change of wording from the Warsaw Convention Art. 24. The Protocol in Art. 24(1) states: "In the carriage of passengers and baggage, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention". The Protocol thus avoided the words "covered by Art. 17".

The interpretation of Art. 24 was recently clarified by the United States Supreme Court in *El Al Israel Airlines v. Tseng.*[80] The Court held that the Warsaw Convention provided the exclusive remedy for the passenger. In reaching that decision the court relied on three factors: 1) The drafting and negotiation history of the Convention, 2) Montreal Protocol No. 4, and 3) Decisions of courts in other Contracting States. The Convention's central purpose is to foster uniformity of private international air law and it provides a comprehensive scheme of liability. The court therefore found it hard to conclude that the Warsaw delegates meant to subject air carriers to the distinct, non-uniform liability rules of the

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[78] *Abramson v. Japan Airlines Co., Ltd (1984) A.Ct.,* 739 F.2d 130 (3d Cir. 1984, no. 83-57750).

[79] See *e.g.*, *Dias v. Transbrasil Airlines, inc. 26 Avi.,* (CCH) 16,048 (S.D. N.Y. 13 October 1998).

[80] *El Al Israel Airlines, Ldt. V. Tseng(1999) S.Ct.,* 525 U.S. 155, 119 S.Ct. 662.

individual signatory nations, which rules might expose the carriers to unlimited liability out of which the Convention would prevent them from contracting. The court further stated that Art. 24 in Montreal Protocol No. 4 "merely clarifies, it does not alter, the Convention's rule of exclusivity." Finally, the court expressed that decisions of the courts of other Convention signatories corroborate this understanding of the Convention's preemptive effect.[81]

The Consequence of the ruling of the United States Supreme Court together with the IATA Intercarrier Agreement seems to be a change in legal position. It is now an "all or nothing" position in the way that if the damage is caused by an accident the passenger will have the benefit of unlimited liability (if flying with an airline that has adhered to the Intercarrier Agreement), but in the absence of an accident the passenger essentially will obtain no compensation at all from the airline. This means that the definition of the word "accident" has become more critical than ever.

The Montreal Convention attempts to clarify the exclusiveness of the Convention by stating (in Art. 29): "In the carriage of passengers, baggage and cargo, any action for damages, however founded, *whether under this Convention or in contract or in tort or otherwise,* can only be brought subject to the conditions and such limits of liability as are set out in this Convention…."(Emphasis added). Which effect this addition to the old Convention will have remains to be seen.

5.5. The Consistency when Applying the Definition of "Accident"

5.5.1. Introduction

Because most courts have adhered to the definition of "accident" in the *Saks* case, in that the definition of an accident must be applied flexibly, the application of "accident" has been less than consistent. Most cases, though, have held that if the event is a usual and expected operation of the aircraft, then no accident has occurred. Similarly, courts have relied on the *Saks* definition, that where the injury results from the passenger's own internal reaction to the usual, normal, and expected operations of the aircraft, it is not caused by an accident. For instance, no accident has occurred if a passenger trips over another passengers shoes and gets hurt, because taking of your shoes during the flight is among the usual and expected operations of the aircraft.[82] Similarly, an allergic reaction to insecticide that is sprayed on the aircraft is not an accident, because it is part of the usual and expected operations of the aircraft and because the allergic reaction is something internal to the passenger.[83]

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[81] The court referred to *e.g., Gal v. Northern Mountain Helicopters Inc.,* Dkt. No. 3491834918, 1998 B.C.T.C. Lexis 1351 (British Columbia); *Emery Air Freight Corp. V. Nerine Nurseries Ltd.(1997),* 3 N.Z.L.R. 723, 735-736 (New Zealand Court of Appeal); *Seagate Technology Int'l v. Changi Int'l Airport Servs. Pte Ltd. (1997),* 3 S.L.R. 1,9 (Singapore Court of Appeal).

[82] *Craig v. Compagnie Nationale Air France (1994),* 45 F.3dd 435 (9th Circ. 1994).

[83] See *e.g. Capacchione v. Quantas Airways (1996),* 25 Avi. (CCH) 17,346 (C.D. Cal. 1996).

This chapter shall examine the courts' applications of the definition of "accident" to different incidents in trying to establish whether or not any clear rule has been arrived at in applying the definitions in practice.

5.5.2. Inherent Risks of Air Transportation

It is clear that the carrier is liable for the inherent risks of air travel, as the Warsaw drafters wished to create a system of liability rules that would cover all the hazards of air travel. The carrier is thought to be in a better position than the passenger to control the risks of air travel, and if it fails to do so, then an accident has occurred. That the carrier is liable for the inherent risks of air travel also fits into the *Saks* definition of an accident in that if the event is not a "usual an expected operation of the aircraft" it is an accident. Standard examples of risks in air travel are an unusual drop of air pressure in the cabin or an unusually high air turbulence. These events have to be unusual, though. In the *Saks* case a passenger claimed compensation from the airline because she had become permanently deaf on her left ear during the flight. The court held that her injury was not caused by an accident within the meaning of Art. 17, the evidence indicating that the pressurization system had operated in a normal manner.

Inherent risks of air travel have evolved over time, and are not the same as they were in 1929 when the Convention was drafted. Today terrorism, bomb threats and hijackings are considered to be among the inherent risks of air travel. In *Salerno v. PanAm*[84] a passenger achieved compensation for an abortion caused by a bomb threat. The mere threat was considered to be an accident under Art. 17. In *Husserl v. Swiss Air Transport Co,*[85] the court stated, "Since 1929, the risks of aviation have changed dramatically in ways unforeseeable by the Warsaw framers. Air travel hazards, once limited to aerial disasters, have unhappily come to include the sort of terrorism exemplified by the Athens attack." The court held that hijacking was an accident covered by Art. 17. This line has been followed in the cases since.[86]

The line of cases is more fuzzy when looking beyond the risks inherent to air travel. In categories of cases such as in-flight illnesses and passenger to passenger interactions, the courts have not come to an agreement about when an accident has occurred. It is not quite clear if the courts, which have held that some events in these categories are accidents, have done so because they have been of the opinion that these events are risks inherent in air travel, or if they make the carrier liable for incidents that go beyond the inherent risks of air travel. These categories will be treated in the following two sections.

5.5.3. In-Flight Illnesses

The courts have had trouble distinguishing the damage from the accident in cases of in-flight illnesses. Some courts have recognized that an illness

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[84] *Salerno v. Pan American World Airways (1985),* 19 Avi. 17,705 (1985).

[85] *Husserl v. Swiss Air Transport Company (1975) D.Ct., Supra* note 67.

[86] See *e.g., Day v. TWA, supra* note 69; *Karfunkel v. Air France (1977) A.Ct.,* 427 F.Supp.971; *Evangelinos v. TWA, Supra* note 68.

caused by an event that is internal to the passenger may be caused by an accident if it becomes aggravated by negligent failure to treat the illness.[87] Other courts have rejected this view.[88] In the *Saks*[89] case the court expressed the following view: "… Article 17 refers to an accident which caused the passenger's injury, and not to an accident which is the passenger's injury. The text thus implies that, however 'accident' is defined, it is the cause of the injury that must satisfy the definition rather than the occurrence of the injury alone."

Cases since *Saks* have had problems with cause and effect, and with determining whether or not the accident has to be a risk inherent is air travel. The cabin crew have been presented with somewhat of a dilemma. The reasoning by some courts has been that if an illness is aggravated by the crew's attempt to help the passenger, that aggravation constitutes an accident, while if the crew did nothing to try to help the passenger an accident has not occurred.[90] Under the logic of *Fischer v. Northwest Airlines*[91] an accident may be said to have occurred if an airline carries and uses a defibrillator incorrectly. However, if the airline does not carry a defibrillator at all, an accident might not have occurred. This leads to an undesirable result as it does not promote the providing of help to a passenger in need. One court has taken a step further and come to the conclusion that failure to provide adequate medical care to a passenger undergoing a heart attack was an accident.[92]

The question is, where do these cases leave the inherent risk of air travel? Does the airline crew have to be doctors at the same time, or have some courts just accepted an interpretation of accident that goes beyond the inherent risks of air travel?[93]

5.5.4. Passenger-to-Passenger Interactions

Professor Goedhuis, the reporter at the drafting of the Warsaw Convention, has stated, "In the example… in which a passenger is injured in a fight with another passenger, it would be unjustifiable to declare the carrier liable by virtue of Article 17, because the accident which caused the damage had no relation with the operation of the aircraft." Most US courts have, in accordance with this statement, found that carriers are not liable for one passenger's assault on the other passenger, because these interactions are not part of the normal operations of the aircraft and are therefore not covered by the word "accident" under Art. 17.[94] For instance, in *Price v.*

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87 See *e.g., Segurian v. Northwest Airlines (1982),* 86 A.D.2d 658, 446 N.Y.S.2d 397 (2d Dep't), *aff'd,* 57 N.Y.2d 767, 454 N.Y.S.2d 991, 440 N.E.2d 1339.

88 *Krys v. Lufthansa German Airlines (1997),* 119 F.3d 1515.

89 *Air France v. Saks (1985), Supra* note 63.

90 See *e.g., Fishman v. Delta Airlines, Inc.,* 132 F.3d 138, 143 (2d Cir. 1998).

91 *Fischer v. Northwest Airlines,* 623 F.Supp. 1064 (N.D. III 1985), 19 Avi 18,362.

92 *Segurian v. Northwest Airlines, Supra* note 87.

93 See Louise Cobbs, *Supra* note 64, p. 124.

94 Goedhuis, "National Airlegislations and the Warsaw Convention", The Hague (1937), p. 200.

British Airways[95] the court held that one passenger's fist fight with another passenger was not an "accident", and the carrier was therefore not liable for the damages.

Not all courts are of the opinion that only inherent risks of air travel are covered by "accident" in Art. 17. In *Barratt v. Trinidad & Tobago Airways Corp.*[96] the court stated that the definition in the *Saks* case is in no way limited to those injuries resulting from dangers exclusive to aviation, and that neither does Art. 17.

As with in-flight illnesses, many cases suggest that passenger-to-passenger assaults, which are not themselves accidents, may by the act or omission of the crew become an accident. An example is *Tsevas v. Delta Airlines, Inc.*[97], where a drunken passenger molested a woman sitting next to him. The court held that this occurrence constituted an accident by virtue of the cabin crew's failure to reseat the woman after she complained about this behavior, combined with the crew's continuous serving of alcohol to the man after the complaint.

The decision by the United States District Court in *Wallace v. Korean Air*[98] is consistent with the above line of reasoning. In this case a woman awoke to find that the passenger seated adjacent to her had placed his hand in plaintiff's underwear to fondle her genitals. She complained to a crew member who immediately reassigned her to a new seat. The court held that no accident had occurred. The reasoning was that there was no act or omission by the aircraft or airline personnel representing a departure from the normal, expected operation of a flight, and that, moreover, sexual molestation is not a risk characteristic to air travel.

The decision of the District Court in the *Wallace* case was, surprisingly, vacated by the Court of Appeals.[99] This court stated, "… it is plain that the characteristics of air travel increased Ms. Wallace's vulnerability to Mr. Park's assault…, she was cramped into a confined space beside two men she did not know, one of whom turned out to be a sexual predator. The lights were turned down and the sexual predator was left unsupervised in the dark." The court further expressed, "… for the entire duration of Mr. Park's attack not a single flight attendant noticed a problem." The court avoids answering the question, if only the inherent risks of air travel are covered by Art. 17, by stating that this event was an inherent risk of air travel and by following the line of other court, in that some events may become accidents by the acts or omission of the cabin crew. However, the court's argumentation is not very convincing. Many other places fit this description; The seats are not more cramped on an

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[95] *Price v. British Airways,* No. 91 Civ. 4947 JFK, 1992 WL 170679 (S.D.N.Y. 7 July 1992), 23 Avi 18,465.

[96] *Barratt v. Trinidad & Tobago Airways Corp.,* No. CV 88-3945, 1990 WL 127590 (E.D.N.Y. Aug. 28, 1990).

[97] *Tsevas v. Delta Airlines, Inc.,* No. 97 C 0320, 1997 WL 767278 (N.D. III. 1 December 1997).

[98] *Wallace v. Korean Air (1999) D.Ct.,* 1999 WL 187213 (S.D.N.Y.).

[99] *Wallace v. Korean Air (2000) A.Ct.,* 214 F.3d 293.

airplane than in many other places, it is not unusual to sit between people you do not know, and the crew did not seem to be negligent.

5.6. Conclusion

Having examined the jurisprudence one may ask, "does the jurisprudence reflect a new tendency to define 'accident' as going beyond the inherent risks of air travel, or do the decisions reflect that the risks in air travel have changed, such that outrageous passenger behavior (for example) have become included in the inherent risks of air travel as have hijackings?" It is not likely that assaults are more common on airplanes than in other public places. It is reasonable to think that a new trend to place the air carrier as an insurer (with the contributory negligence defense, of course) may be emerging, meaning that the carrier may be held liable for all risks and not only those inherent in air travel.

The Montreal Convention should, in the light of the practical problems with the word accident, have attempted to clarify for which events the carrier is to be held liable. It is a missed opportunity, in the light of an emerging tendency to hold the air carrier liable for occurrences that do not exactly go to the operation of the aircraft, that the Convention did not go all the way, so to speak, and make the carrier liable for an "event" instead of an "accident" in accordance with the Guatemala City Protocol. This might also make the litigation go a little smoother.

Chapter 6. Types of Injuries for which the Air Carrier is Liable

6.1. Introduction

This question is dealt with exclusively in Art. 17 in the words "death or wounding of a passenger or any other bodily injury". At first glance these words seem quite clear. Death and wounding is damage to the body, and as the sentence continues with "any other bodily injury", the natural understanding would be that pure mental suffering, which is not damage to the body, is excluded. However, in practice the words have not been so easily interpreted.

This chapter will purport to give an analysis of case law examining the term "bodily injury" in the Warsaw Convention Art. 17. Focus will be put solely on US case law, since almost all the courts that have had to deal with emotional distress are American.[100]

The litigation concerning the interpretation of "bodily injury" emerged in the early seventies because of a large number of hijackings. The victims sued the airlines claiming compensation for their mental sufferings caused by these hijackings. The major questions to be answered were, does the term "bodily injury" encompass pure mental sufferings without any physical

[100] An exception is *Compagnie Air France c. Consorts Teichner,* (1985) 39 R.F.D.A. 232; (1988) 23 Eur. Tr. L. 87. In this case the supreme court of Israel allowed compensation for psychic trauma alone under Art. 17.

manifestation? Moreover, does Art. 17 allow compensation for mental sufferings caused by physical injury?

6.2. Mental Anguish Unaccompanied by Physical Injury

Cases examining the question on whether or not compensation could be granted for mental injuries alone were divided into two camps before the case of *Eastern Airlines v. Floyd* where the question was finally settled. In interpreting the term "bodily injury" the courts have examined the French text which uses the words "lésion corporelle" and the context in which the words were used. Furthermore, the courts have looked at the drafting history of the Convention and the purpose of uniformity of law. The two different camps have virtually been in disagreement about all of the above.

This section will examine the courts' arguments for and against the question if mental injury alone is covered by Art. 17 to show how they arrived at such different conclusions. Finally the section will examine the case of *Eastern Airline v. Floyd* and later cases to show what the opinion is today and to examine if the question is really solved.

6.2.1. Not covered by Art. 17

The early case of *Burnett v. TWA*[101] held that Art. 17 does not cover mere mental anguish. This is one of the three cases on the hijacking in September 1970 to a desert in Jordan. The court found that, as French was the sole original language of the Convention, the French legal meaning must govern the interpretation of the terms in the Convention. Because French scholars have made a sharp distinction between bodily injury (lésion corporelle) and mental injury (lésion mentale), and as "lésion corporelle" in a leading work has been defined as "an infringement on physical integrity", the court determined that the two exclude each other, and that the term "bodily injury" therefore excludes mental injuries.[102]

The court also found the legislative history to be highly relevant. The predecessor of the Warsaw Convention (a protocol drafted at the Paris Conference in 1925) authored an initial draft on the liability provision which read: "Le transporteur est responsable des accidents, pertes, avaries et retards". This draft was revised by a group of law experts which added the words "in the case of death, wounding, or any other bodily injury". The court concluded, as the revised draft is practically identical to Art. 17 in the Warsaw Convention, that recovery was restricted to bodily injuries to narrow the otherwise broad scope of liability under the former draft and preclude recovery for mental injuries alone.

Finally, the court found it significant that the Berne Convention which in its original draft closely resembled Art. 17, was later changed by the addition of the words "ou mental" to the text to allow recovery for mental injuries.

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[101] *Burnett v. TWA (1973) D.Ct.,* 368 F.Supp. 1152.

[102] A. Colin and H. Capitant, "Traite de Droit Civile 605" (revised by J. de la Morandiere, 1959).

The leading decision denying compensation for mental anguish alone is *Rosman v. TWA*[103], also one of the three hijacking cases mentioned above. The court was aware that the French language was the controlling language of the Convention, but as there was no dispute over the proper translation of the liability provisions, the court did not examine the translation. The court in addition found, in the contrast of the court in the *Burnett* case, that the French legal meaning of "lésion corporelle " was not relevant. Focus was then placed on the ordinary usage, and the court held that the inclusion of the term "bodily" to modify "injury" could not be ignored, and that the term "bodily" suggests opposition to "mental". The court concluded: "… the ordinary, natural meaning of "bodily injury" as used in article 17 connotes palpable, conspicuous physical injury, and excludes mental injury with no observable "bodily" as distinguished from "behavioral" manifestations."

The narrow interpretation was also justified by looking at the apparent purpose of the Convention. It was consequently found that the provision should be interpreted to promote uniformity.

Some scholars have relied upon the subsequent conduct of the parties to the Convention as a guide to interpreting Art. 17. It has been argued that the fact that there have been several attempts to amend this Convention to provide a remedy for pure emotional distress offers strong evidence that Article 17, as presently formulated, does not treat emotional distress as a "lésion corporelle".[104] The *Saks*[105] case has also been referred to as a support for a narrow interpretation of "bodily injury".[106] In that case the court stated that the Guatemala City Protocol's change of wording in Art. 17 was meant to expand the scope of the Convention and not just clarify the terms. The fact that this Protocol intended to expand the liability of the carrier lessened the court's view that the Protocol's use of a broader language justifies a broader view of the pre-existing Convention as well.[107]

The case of *Eastern Airlines v. Floyd* focused on many of the above arguments. This case and the situation today will be examined in Section 6.2.3. First, however, a review will be made of the arguments put forward to support a broad interpretation of "bodily injury".

6.2.2. Covered by Art. 17.

A landmark decision allowing compensation for pure mental injury was *Husserl v. Swiss Air Transport Company*[108]. In the same vein as the *Rosman* case, the court wrote: "It is true that this country adhered to the French text of the Convention, as did all of the signatories, but … that fact does not

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[103] *Rosman v. Trans World Airlines (1974) N.Y.A.Ct.,* 34 N.Y.2d 385, 314 N.E.2d 848, 358 N.Y.S.2d 97.

[104] G.C. Sisk, "Recovery for Emotional Distress Under the Warsaw Convention: The Exclusive search for the French Legal Meaning of Lésion Corporelle", (1990) 25 Tex. Int'l L.J., 127.

[105] *Air France v. Saks, Supra,* note 63.

[106] Sisk, *Supra,* note 104, p.114 and 145.

[107] See Caroline Desbiens, "Air Carrier's Liability for Emotional Distress Under Article 17 of the Warsaw Convention: Can it Still be Invoked ?", (1992) Annals of Air & Space Law Vol. XVII-II, 164-165.

[108] *Husserl v. Swiss Air Transport Company (1975) D.Ct., Supra* note 67.

mean that the French legal meaning of the words or the French legal interpretation of the treaty is binding." However, the court found, in accordance with *Rosman* that the meaning of "lésion corporelle" must nevertheless be established in order to determine whether or not "bodily injury" is a correct and meaningful translation of that expression. The court found that it was a correct translation. Contrary to *Rosman*, the court was of the opinion that the ordinary meaning of the words "death, wounding or any other bodily injury" could be interpreted to cut either way in that the words can, almost as easily, be construed to relate to emotional and mental injury. The court basically relied on the premise that mental reactions and functions are part of the body.

In dealing with the intention of the drafters the court deduced that the Parties probably had no intention at all about mental injuries, because if they had, they would have clearly expressed those intentions. The court took the silence to mean that the drafters did not intend to exclude any particular type of injury. Contrary to *Rosman* it was held that to effect the treaty's purpose, the types of injuries enumerated should be construed expansively to encompass as many types of injuries as are conceivably within the scope of the enumerated types.

The other leading decision allowing recovery for mental anguish alone is *Floyd v. Eastern Airlines,*[109] where a plane temporarily lost power when the plane's three engines failed. Fortunately the crew managed to restart one engine, and the plane landed safely. Unlike the court in *Husserl*, the court relied on the French legal meaning of "bodily injury" to reach its conclusion, as the Convention reflects a civil law liability regime. After careful review of the cases and commentary on the meaning of "lésion corporelle", the court was persuaded that the term covers any "personal injury" including mental anguish. It reasoned that the literal translation of "lésion corporelle" into "bodily injury" does not fully capture its French legal meaning. The meaning of that expression in French law is more correctly rendered by the words "personal injury". Furthermore, the court was convinced that there was nothing in French law prohibiting compensation for any particular type of damage, including emotional trauma.

About the intention of the drafters of the Convention, the court found that the wording of Art. 17 suggests that the drafters did not intend to exclude any particular category of damages, because if they wanted to exclude mental injury, they would not have singled out a particular case of physical impact such as "blessure" ("wounding").

The court also looked at the subsequent legislative history of the Warsaw Convention and conduct of the parties. It was found instructive that the Montreal Agreement and the Civil Aeronautics Board Order, which approved the terms of this Agreement, used the terms "personal injury" and "bodily injury" interchangeably, and that the notice on the passenger tickets uses the words "personal injury". As Caroline Desbiens states, Sisk's reply to this argument was that the main purpose of the Montreal Agreement was

[109] *Floyd v. Eastern Airlines, Inc. (1989) A.Ct.,* 872 F.2d 1462.

to increase the limit of liability and to waive the defense under Art. 20(1). The Agreement did not waive other liability provisions in the Convention.[110] [111] Furthermore, the court referred to the Guatemala City Protocol where in the English text "wounding or other bodily injury" was substituted with "personal injury". However, the French text retained the words "lésion corporelle".

6.2.3. Today - Eastern v. Floyd[112] and Subsequent Cases

The above mentioned case of *Floyd v. Eastern* was appealed by the airline to the Supreme Court of the US. The supreme Court rendered its decision on 17 April 1991, and with that settled the debate by holding that Art. 17 does not cover compensation for pure mental injury.

The court first stated that the French legal meaning of "lésion corporelle" must be used for guidance as to the shared expectations of the parties, because the original text was drafted in French. The court concluded, after having consulted many bilingual dictionaries, that the definitions of "lésion corporelle" accord with the English translation. Moreover, the court stated that a review of relevant French legal materials reveals no legislation, judicial decisions, or scholarly writing indicating that in 1929 "lésion corporelle" had a meaning in French law encompassing psychological injuries. Contrary to the *Burnett* case, the court accepted that the term "lésion corporelle" does not have a precise legal definition, and it was not a common legal term from 1929 onwards.

The court found the translation to "bodily injury" from the French term to be consistent with the negotiation history of the Convention. The unavailability of compensation for purely psychic injury in many common and civil law countries at the time of the Warsaw Conference persuaded the court that the signatories had no specific intent to include such a remedy in the Convention. Furthermore, as pointed out in the *Burnett* case, the court found it reasonable to infer that the drafters rejected the broader proposed language in the Protocol of the Paris Conference and adopted the narrower language to limit the types of recoverable injuries.

The court also referred to the goals of the Warsaw Convention. Contrary to *Husserl*, the court found that the primary goal of the Convention was best reached by a narrow interpretation of Art. 17. That conclusion was reached because the court found that the primary goal was to limit the air carriers' liability in order to foster growth of the then fragile aviation industry, and not to provide full recovery to injured passengers. Finally, the court referred to the Berne Convention and the post-1929 conduct of the Warsaw signatories.

The Montreal Agreement was not found to support a broad interpretation of Art. 17 since there was no evidence that this Agreement intended to effect any change of Art. 17. Furthermore, it is not a treaty but an agreement, so it cannot speak for the signatories to the Warsaw Convention. Likewise, the court did not believe that the Guatemala City

[110] Desbiens, *Supra,* note 107, p. 165.
[111] Sisk, *Supra* note 104, p. 145.
[112] *Eastern v. Floyd (1991) S.Ct.,* 499 U.S. 530, 111 S.Ct. 1489.

Protocol shed any light upon the intended scope of Art. 17, especially because only a few countries ratified this Protocol.

The case of *Eastern v. Floyd* closed the debate that had been going on for many years on whether or not mental anguish unaccompanied by physical injury was covered by Art. 17, and its decision has been followed subsequently. In *Terrafranca v. Virgin Atlantic Airlines*[113] the court held that trauma sustained as a result of bomb threat did not result in "bodily injury". The court stated: "The Supreme Court endorsed this translation in Floyd and held that this requirement has a distinctly physical scope. We therefore hold that Mrs. Terrafranca must demonstrate direct, concrete bodily injury as opposed to mere manifestation of fear or anxiety."

After the *Eastern* case the focus has been shifted to the question of which types of psychological injuries actually constitute "bodily injuries" owing to the traces they leave in the body. With the evolution of science, more and more psychological injuries are found to have physical impacts. In *Weaver v. Delta Airlines* the plaintiff did not claim that Art. 17 governs pure mental anguish. Instead she claimed that her post-traumatic stress disorder was a physical injury, and she did it with success. The court found that the impact on her of the events which occurred on the flight was extreme and included biochemical reactions which had physical impacts upon her brain and nervous system.

This leads us to the question of whether or not physical injury following mental injury or the reverse is recoverable under Art. 17.

6.3. Mental Anguish Accompanied by Physical Injury

The issue whether passengers can recover for mental injuries accompanied by physical injuries was not addressed in the Supreme Court's decision in *Eastern v. Floyd.* Therefore it is still somewhat doubtful to what extent mental anguish caused by physical injury sustained as a result of an accident is compensable under Art. 17. Likewise, one may wonder if physical injury caused by mental anguish resulting from a hijacking is covered by Art. 17.

6.3.1. Mental Anguish Caused by Physical Injury

Only few cases have dealt with mental anguish caused by physical injury resulting from an accident under Art. 17. These cases have advocated a narrow interpretation of Art. 17, but have held that mental anguish resulting from bodily injury can be compensated under Art. 17.

In *Burnett v. TWA*[114] the court focused on the fact that Art. 17 reads that the carrier is liable for "damage sustained *in the event of ... any other bodily injury* suffered by a passenger" (emphasis added). The court stated : "Certainly, mental anguish directly resulting from a bodily injury is damage sustained in the event of a bodily injury. The delegates apparently chose to follow this well recognized principle of law allowing recovery for mental anguish resulting from the occurrence of a bodily injury, the emotional distress being directly precipitated by the bodily injury being considered as a part of the bodily injury itself."

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[113] *Terrafranca v. Virgin Atlantic Airways (1997) A.Ct.,* 151 F.3d 108.
[114] *Burnett v. TWA, Supra* note 101.

Rosman v. TWA[115] addressed both the question of whether mental anguish flowing from bodily injury is covered by Art. 17 and the question of whether bodily injury flowing from mental anguish is compensable. The court held: "Thus, as we read article 17, the compensable injuries must be "bodily" but there may be an intermediate causal link which is "mental" between the cause - the "accident" - and the effect - the "bodily injury". And once that predicate of liability - the "bodily injury" - is established, then the damages sustained as a result of the "bodily injury" are compensable including mental suffering. However, only the damages flowing from the "bodily injury", whatever the causal link, are compensable." The court as a consequence of this statement concluded that the airline was liable for plaintiff's palpable, objective bodily injuries, including those caused by the psychic trauma of the hijacking, and for the damages flowing from those bodily injuries, but not for the trauma as such or for the non-bodily or behavioral manifestations of that trauma.

Both of the above mentioned cases relied on a literal interpretation of Art. 17 in reaching their conclusion. However, Desbiens in her article on air carrier's liability for emotional distress states that some of the arguments put forward by the Supreme Court in the *Eastern* case raised doubts as to whether or not mental anguish accompanied by physical injuries is compensable.[116] One of the arguments put forward by the Supreme Court was that compensation for mere mental anguish contravenes the primary purposes of the Convention, i.e., protecting the air carriers and uniformity of international air law. Desbiens argues that permitting recovery for mental anguish accompanied by physical injury would also contravene these purposes.

Nevertheless, mental anguish caused by physical injury seems to be compensable also after *Eastern v. Floyd*. In a decision from 8 Feb. 2000, *Alvarez v. AA,*[117] the court held: "Plaintiff may recover compensation for psychological and emotional injuries only to the extend that these injuries are proximately caused by his or her physical injuries. Psychological and emotional injuries that are merely accompanied by physical injuries are not compensable."

6.3.2. Physical Injury Caused by Mental Anguish

The case law on this issue is very limited. The only case directly dealing with the matter was *Rosman v. TWA*. In this case the court concluded that if the plaintiff's skin rash was caused or aggravated by the fright she experienced on board the air craft, then she should be compensated for the rash and from the damages flowing from it. The court, as stated above in chapter 6.3.1., found that there may be an intermediate causal link which is "mental" between the cause - the accident - and the effect - bodily injury. However, it is not possible to obtain compensation for the intermediate causal link - the mental anguish.

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[115] *Rosman v. TWA, Supra* note 103.
[116] Caroline Desbiens, *Supra* note 107, p. 182-183.
[117] *Alvarez v. American Airlines (2000) D.Ct.,* 2000 WL 145746 (S.D.N.Y.).

The court's decision in Rosman has not been challenged. However, in the recent case of *Alvarez v. AA*[118] the plaintiff did not obtain compensation for his post-traumatic stress disorder (PTSD) - even though it had physical manifestations - because it was not caused by the physical injuries suffered during the evacuation of the aircraft but by the mental anguish suffered due to the evacuation. The court stated: "… if physical manifestations of psychic distress such as increased heart rate and elevated blood pressure could support a recovery under the Warsaw Convention, a passenger frightened by air turbulence could recover on the basis of his increased heart rate. The rule that passengers cannot recover under Art. 17 of the Convention for purely psychological injuries … thus would be converted into a mere pleading formality." The court thus did not disagree in the reasoning of *Rosman* that bodily injury with an in between mental link is recoverable. It just found that PTSD was not physical injury.

However, it seems illogic that a skin rash caused by mental anguish is compensable under Art. 17, but elevated blood pressure is not. This leads us back to the whole issue mentioned above in section 6.1.2. of what constitutes bodily injury and how it is decided which physical manifestations are compensable.

6.4. The Montreal Convention

The Montreal Convention does not offer any substantive changes to Art. 17 of the Warsaw Convention. Under the new Convention the carrier is liable for "… death or bodily injury of a passenger." Some of the Drafters of the Montreal Convention wanted to provide a remedy for mental anguish unaccompanied by physical injury. However, this suggestion was rejected by the majority at the Montreal Conference. Instead some of the members proposed an "interpretive statement" of the term "bodily injury" as an attempt to make possible the compensation for mere mental anguish. According to this statement jurisprudence could evolve under national law to the effect that recovery for mental anguish would be allowed. As Thomas J. Whalen writes in his article about the Montreal Convention, it is a mystery how development of national jurisprudence should be able to change the wording and scope of a convention.[119]

The Guatemala City Protocol used the concept "personal injury", and it is a missed opportunity that the Montreal convention does not provide the possibility of compensating pure mental anguish by using a term wider than that of "bodily injury". First of all as medical research evolves it becomes more and more difficult to separate physical injury from mental anguish as these are often intertwined. Secondly, it is about time to recognize that mental trauma's may be as debilitating as physical injury.

The Danish Transport by Air Act from 1937 used the words "skade på person" (translation: "personal injury") in stead of bodily injury. This is the same term as is used in the general Danish Liability Act. However, that does not mean that Denmark has the legal tradition of granting compensation for mental anguish, or that compensation would be granted for mental anguish

[118] *Supra* note 117.
[119] Thomas J. Whalen, *Supra* note 23, p. 17.

in an aviation accident. In the Danish Act from 1960 the wording was changed to "skade på legeme eller helbred" (translation: "injury to body or health") to make the text more compatible with the text of the Warsaw Convention The Danish jurisprudence on compensation for mental anguish is very limited, from the few existing cases one can conclude that the courts are very reluctant when it comes to granting compensation for pure mental damage, even more so than most other countries.[120]

Chapter 7. Conclusion

Having examined the merits and in particular the shortcomings of the Warsaw System and compared them with the Montreal Convention, the answer to whether or not Denmark ought to ratify this new Convention seems quite obvious. The answer is yes; not only because the Montreal Convention solves a major part of the problems of the old system, but also because ratification by the countries parties to the Warsaw System is a necessity if the new Convention is to achieve the goal of unifying private international air law once again. If some countries keeps on being parties to the Warsaw Convention while other adhere to the Montreal Convention the disunification, which became a result of the attempts to repair the old system, will keep on existing.

The Montreal Convention is not a perfect treaty, if such exists, but the need for a new Convention is urgent. The reasons why have been introduced already in chapter 2 and have been elaborated in the subsequent chapters. However, some of them deserves repetition here at the final stage.

The conditions that the old Convention was built on do not exist anymore. The aviation industry does not need special protection anymore, and the airlines themselves have assumed unlimited liability. Therefore the reason for the liability limit is gone. Furthermore no limit of liability seem acceptable today as a limit does not conform with the principle of restitution and as special attention has been given to consumer protection. The dissatisfaction with the liability limit has caused the courts, especially in the US, to take advantage of some of the ill-definable terms in the Convention and stretch some of the Articles in the Convention to absurdity. Examples are findings of wilful misconduct in situations that seems far outside the scope of this term and creatively interpreting Art. 3 to contain a notice requirement.

Moreover, some of the terms in the Warsaw Convention, such as "wilful misconduct", "accident" and even "bodily injury" have caused problems of interpretation in the jurisprudence. These are some common law words in the convention that is otherwise primarily drafted under the influence of the European civil law concepts The problems caused by these terms, as well as the dissatisfaction with the limit of liability, has led to lengthy and costly litigation where the victims not only have to wait for

[120] See Bo Von Eyben, "Lærebog i erstatningsret", third edition 1995, p. 291-292.

many years to obtain any compensation, but also have to face the difficulty of predicting the outcome of any given case.

The new Convention offers a solution to some of those problems. By providing a regime of unlimited liability the Convention conforms with the principles of restitution and consumer protection in modern society. Furthermore the unlimited liability regime overcomes the interpretation problems of "wilful misconduct" and Art. 3 about the legal significance of the ticket, as there is no limit of liability to try to exceed. The elimination of "wilful misconduct" and the strict liability up to SDR 100,000 for damage to passengers are expected to expedite the recovery of damages and to avoid lengthy and costly litigation.

The lack of many new features in the Montreal Convention shows that the Warsaw System is not all bad. The Warsaw convention constitute the pillars on which the bricks of the new Convention are built. It minimized the conflict of laws and the conflicts of jurisdiction. It made the law mandatory, so that the parties could not contract out. Many of the articles of the Warsaw convention stand unchanged in the new Montreal Convention. However the old system needs to be reunified and modernized and the Montreal Convention has done that. It consolidates the instruments of the Warsaw System into one single document, and it modernizes the ticketing system by allowing electronic ticketing and by recognizing the consumer values of the legal systems today, which recognition is apparent in the liability regime but also in the 5th jurisdiction.

It is a pity, though, that the Montreal convention did not change or clarify the words 'accident' and 'bodily injury' which has caused considerably difficulties in interpretation. The lack of any solution to the question on whether the air carrier is liable for events that do not constitute inherent risks of air travel means that the problems will exist under the new Convention as well. One can always hope that the courts will solve the problem in the future, but it would have been preferable that the term was clarified by the Delegates at the Conference in stead of left to the courts. The same can be said for "bodily injury". The Guatemala City Protocol used the concept "personal injury", and it would have been preferable if the Montreal Convention had used this wider term as well. It might be clear now that only physical injury is compensable but a problem of distinguishing physical injury from mental trauma seems to be emerging.

Despite the missed opportunities in the Montreal Convention, the result of this Convention appears to be a good international instrument and it is no doubt an improvement of the Warsaw System in that it conforms with the needs of today's society. It seems to have reached a balance between the interests of the traveling public, the air carriers and the transport industry, and it is to be hoped that it will soon enter into force to be tested in practice.[121]

[121] See the Statement from the President of the Conference in May 1999, ICAO Update - May 1999 at http://www.icao.org/en/jr/5404_upl.htm.

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